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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1805

STATE OF MARYLAND,

Petitioner,

v.

CONRAD WHITFIELD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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No.

STATE OF MARYLAND,

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v.

CONRAD WHITFIELD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The State of Maryland, Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals of Maryland, the highest court of the State, entered in *Whitfield v. State*, No. 54, Sept. Term, 1979 (Md., opinion by Digges, J., filed Feb. 15, 1980).

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, *Whitfield v. State,* No. 54, Sept. Term, 1979 (Md., opinion by Digges, J., filed Feb. 15, 1980), reported but not yet printed, is included as Appendix A to this Petition. The opinion of the Court of Special Appeals of Maryland, reported at 42 Md. App. 107, 400 A.2d 772 (1979), is reproduced as Appendix B.

JURISDICTION

The judgment of the Court of Appeals of Maryland, which is sought to be reviewed, was filed on February 15, 1980. This Petition is filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED FOR REVIEW

Are statements obtained from an inmate admissible in a criminal prosecution where correctional officers, without providing him with *Miranda*[1] warnings, question the inmate, in an effort to quell an emergency situation, (1) as to the location within the jail of a handgun known to be in the inmate's control, and (2), after the retrieval of the handgun, as to the details of an escape plan?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

[1] Miranda v. Arizona, 384 U.S. 436 1966).

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Conrad Whitfield, Respondent, was, on June 22, 1977, convicted after a jury trial in the Criminal Court of Baltimore (Allen, J.) of conspiracy to violate the escape laws and carrying a handgun. Respondent was sentenced to concurrent terms of imprisonment of 10 and three years, respectively.

A timely appeal was filed to the Court of Special Appeals of Maryland, which, on April 11, 1979, affirmed the judgment of the Criminal Court of Baltimore. *Whitfield v. State*, 42 Md. App. 107, 400 A.2d 772 (1979). *See* Appendix B.

On July 19, 1979, the Court of Appeals of Maryland ordered that a

> "writ of certiorari to the Court of Special Appeals shall issue and that review shall be limited to the following questions: (1) in the absence of *Miranda* warnings, the trial court improperly admitted incriminating statements made by Whitfield during interrogations conducted by jail authorities; and (2) assuming, *arguendo*, that the Court of Special Appeals properly concluded that the issue of the admissibility of Whitfield's statements to prison officials was preserved by Whitfield for appeal, did the Court of Special Appeals properly conclude that *Miranda* warnings were not required before eliciting statements during an on-the-scene investigation designed to maintain prison security. . . ."

On February 15, 1980, the Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals of Maryland and remanded the case to the Criminal Court of Baltimore for a new trial. *Whitfield v. State*, No. 54, Sept. Term, 1979 (Md., opinion by Digges, J., filed Feb. 15, 1980). *See* Appendix A.

The background of the instant case was summarized by the Court of Special Appeals of Maryland:

> "The factual scenario began in the spring of 1976. From May to July of that year, Whitfield and one Thomas Brown were involuntary residents in the Baltimore City Jail. By happenstance, each was represented, on unrelated criminal matters, by the same attorney, Marshall Stewart. On July 2, 1976, Brown was in the Southwestern District Court for a hearing on a case there pending against him. Stewart, who was representing Brown in that proceeding, was also present. Brown took Stewart aside and told him he 'had some information about a pistol' in the jail, and that he wanted 'to speak to somebody' about it. Stewart informed the Police Captain in charge of the District, and Brown was taken to Central Police Headquarters where he gave a written statement relative to the details of the gun's being in the jail." 42 Md. App. at 109, 400 A.2d at 775; Apx. B. at 34a.

The police relayed this information to the jail authorities, and Correctional Captain Britton and Lieutenant Young were dispatched by Major Parks to "locate . . . [Respondent] then and confront him with the information." The three correctional officers then approached Respondent as he was getting off an elevator, and Young said, "Come with me . . ." in order to "direct . . . [Respondent] to an isolation area." Young explained that removal to an isolation area was necessitated "[d]ue to the fact other residents were with . . . [Respondent] and we didn't want them to spread to the institution and lose the opportunity perhaps of obtaining the weapon." Young testified that his

approach was to confront Respondent "as if you emphatically know that they are guilty of a said situation" in order to obtain a positive response. He described his intent as to "[s]hock but not intimidate."

Britton told Respondent

> "that Cadet Little and some police officers from the Baltimore City Police Department were in the Deputy Warden's office and knew everything about the handgun being in the institution and it would be best for all concerned if . . . [Respondent] would turn the gun in and prevent anybody from getting hurt.[2]
>
> . . . .
>
> . . . [Respondent] told me that he would have to retrieve the gun from a given area of the institution, and that he would have to go by himself to retrieve the gun."

Respondent agreed to retrieve the weapon; he was then allowed to leave the presence of the officers, and, approximately five or ten minutes later, he returned with the gun.

Respondent was then taken to Parks' office for further questioning. Britton offered Respondent a cup of coffee and told him he could contact an attorney. Britton did not advise Respondent of the other requirements of *Miranda*. Several minutes later Respondent and Britton were joined by Stewart's legal assistant, John Clauss. In response to questioning by Britton, Respondent then "laid everything out . . ., what was supposed to have transpired . . ." with

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[2] In its decision, the Court of Appeals of Maryland hinted that its judgment may be sustained on an independent ground of state law, *i.e.*, "under nonconstitutional Maryland criminal law as recently discussed in Hillard v. State, 286 Md. 145, 150-54 . . . (1979)." Slip op. at 4 n. 4; Apx. A at 4a n. 4. In view of the correct observation that the issue was not raised by Respondent in any forum, the Court of Appeals of Maryland was not afforded the opportunity to avoid deciding the constitutional issue presented herein by resting its decision on Maryland nonconstitutional law. *See Hillard*, 286 Md. at 150 n. 1.

regard to a planned escape. When Britton's questioning moved from the gun and the alleged escape plot into "other problems that we had in the institution," Clauss told Respondent not to answer questions on these "other areas." Respondent was then held in Parks' office for one-and-a-half or two hours until he was taken to police headquarters for further questioning.

The Court of Appeals of Maryland held that the questioning both before and after the retrieval of the gun constituted "custodial interrogations" such that the correctional officers were required to give Respondent *Miranda* warnings before the elicited statements were admissible in a criminal prosecution. In so holding, the Court of Appeals of Maryland rejected Petitioner's contention that the exigencies of the situation obviated the necessity that *Miranda* warnings be given. Murphy, C.J., and Smith, J., concurring in part and dissenting in part, dissented only to the extent of finding that the questioning before Respondent retrieved the gun did not constitute an interrogation.

REASONS FOR GRANTING THE WRIT

GUIDANCE FROM THIS COURT IS NECESSARY TO RESOLVE THE CONFLICTING DECISIONS AS TO WHETHER STATEMENTS, OBTAINED WITHOUT BENEFIT OF *MIRANDA* WARNINGS, ARE ADMISSIBLE IN A CRIMINAL PROSECUTION WHERE, IN EMERGENCY SITUATIONS SUCH AS THE ONE IN THE INSTANT CASE, THE QUESTIONING OF RESPONDENT IS THE ONLY COURSE OF ACTION WHICH PROMISES RELIEF, HUMAN LIFE IS AT STAKE, AND THE PRIMARY PURPOSE OF THE QUESTIONING IS TO EASE THE EMERGENCY.

All three Maryland courts which have considered this case recognized the exigencies of the situation. Speaking for the Court of Special Appeals of Maryland, Chief Judge Gilbert wrote:

> "We hold that where, as here, correctional officers of a penal institution are informed of the existence of a weapon cached within the institution's confines and, consequently, presenting the possibility of an imminent breach of security or a volatile situation, a questioning of a person reasonably likely to have knowledge of the weapon's whereabouts so as to aid the officials in removing the weapon from the institution, or which questioning is designed to secure the safety of the prison population, is permissible. . . .
>
> . . . Only the most unusual explosive circumstances will excuse *Miranda* compliance.
>
> Judge Allen [the trial judge] thoughtfully summed up the situation that confronted Major Parks, Captain Young and Lieutenant Britton when he said:
>
> > '[A] prison is a different type of facility than anything [else] we have in this country . . . . [There] different rules are followed, different regulations for control, different anxieties arise and reactions to those are different . . . . [W]hereas it might have been wise in the courthouse, for instance, to rush in with a squad of policemen to find . . . [the] gun that had gotten into the courthouse, I find the actions of the officers at the Baltimore City Jail wise and commendable in the course that they took, . . . as quietly as possible, without exciting the other prisoners, or without letting it be known what was going on, to secure the dangerous situation [in which] they found themselves . . . . . [T]hey went about it by quietly talking to Mr. Whitfield, letting him know they knew he had a gun or that he had access to a gun, directed him to go get it rather than charge through the halls with him to get it, recovering the gun and then questioning Mr. Whitfield with reference to — of the details of the alleged prison break or the planned prison break. . . . I think it would be stretching it a great deal if we required prison officials acting in a very dire emergency to accord to prisoners under their care the right guaranteed by the Miranda case.'" 42 Md. App. at 128-29, 400 A.2d at 785; Apx. B at 53a-54a.

The Court of Appeals of Maryland acknowledged that "there is probably some validity to the State's assertion that in some situations they would not receive the necessary information . . ." if *Miranda* warnings were required under the circumstances of this case such that "their ability to adequately maintain the safety and security of the jail would be greatly hampered." Slip op. at 16-17; Apx. A at 14a. This acknowledgement is in keeping with the decisions in *Bell v. Wolfish*, ___ U.S. ___, ___, 99 S. Ct. 1861, 1877-78 (1978), and *Thomas v. State*, 285 Md. 458, 468 (1979), both involving curtailment of Fourth Amendment rights in the prison setting.

When faced with emergency situations, courts from other jurisdictions have declined to hold that *Miranda* warnings must be given. There are at least seven different theories under which *Miranda* has been held inapplicable, reflecting the confusing status of the law: (1) no underlying rationale: *United States v. Marzett*, 526 F.2d 277, 278 (5th Cir. 1976); *People v. Brown*, 266 N.E.2d 131, 135-36 (Ill. App. 1970); (2) no interrogation: *Tucker v. State*, 229 S.E.2d 617, 618 (Ga. 1976); *People v. Chestnut*, 418 N.Y.S.2d 390, 394 (App. Div. 1979); *State v. LaRue*, 578 P.2d 66, 69-70 (Wash. App. 1978); (3) on-the-scene investigation:[3] *Johnson v. State*, 269 N.E.2d 879, 881 (Ind. 1971), *cert. denied*, 405 U.S. 921 (1972); *State v. Holsclaw*, 257 S.E.2d 650, 653 (N.C. App. 1979); (4) no custody, no interrogation, on-the-scene investigation: *State v. Archible*, 212 S.E.2d 44, 45-46 (N.C. App. 1975); (5) not violative of *Terry v. Ohio*, 392 U.S. 1 (1968):[4] *People v. Mullins*, 532

[3] *See Miranda*, 384 U.S. at 477-78.

[4] With regard to the propriety of applying the *Terry* rationale to potential *Miranda* situations, it was observed in State v. Hudson, 325 A.2d 56, 62 (Me. 1974):

> "We have no doubt that police officers, acting in *Terry* situations, may properly ask questions directed toward ascertaining the presence of weapons which present a danger to the officer or to others nearby. The questions, however, must be strictly limited to accomplishing that proper defensive purpose — they may not be in the nature of fact gathering as a part of the preparation of proof to be used against a defendant in a charge which had been lodged against him.
>
> But what we have before us is not a question of the right of police officers to ask the whereabouts of a gun for their own safety but of the use in evidence of an incriminating admission made during custodial interrogation against a defendant who had not been warned of his rights against self-incrimination." (Footnote omitted.)

P.2d 733, 735 (Colo. 1975); *State v. Lane*, 467 P.2d 304, 305-06 (Wash. 1970); (6) on-the-scene investigation, not violative of *Terry v. Ohio*: *Pope v. State*, 478 P.2d 801, 804-05 (Alas. 1970); *State v. Heath*, 592 P.2d 1302, 1304-05 (Ariz. App. 1979); and (7) *res gestae: People v. Toler*, 206 N.W.2d 253, 255-56 (Mich. App. 1973).

Though the Court of Appeals of Maryland declined to adopt it, an eighth approach, the emergency exception to *Miranda*, has evolved, particularly in view of this Court's decisions in *Mincey v. Arizona*, 437 U.S. 385, 392 (1978), and *Michigan v. Tyler*, 436 U.S. 499, 509 (1978), and, for the reasons *infra*, is the rationale most logically applicable to the instant case. This exception was synthesized by the Court of Appeal of California in *People v. Riddle*, 148 Cal. Rptr. 170, 176-77 (Cal. App. 1978), *cert. denied*, 440 U.S. 937 (1979),[5] with respect to the question of a possible witness to the victim's disappearance:

> "[T]he two basics of the *Miranda* opinion relevant here are (1) its assumption that the purpose of custodial interrogation is to further criminal prosecu-

[5] In Six Companies v. Joint Highway Dist. No. 13, 311 U.S. 180, 187 (1940), this Court held, as to the District Court of Appeal of California, that "[w]hat the court said . . . was a statement of the law of California . . . ."

The issues presented in Riddle's Petition for Writ of Certiorari, No. 78-5798, Oct. Term, 1978, were that his silence "in the face of police questioning was erroneously admitted into evidence" and that his confessions were involuntary.

tion, and (2) its public policy to outlaw police misconduct relating to the third degree. Neither point is central to the question of police conduct in emergencies, where the primary objective of police action is to save human life. The principle of exigent circumstances was not before the *Miranda* court, and the court found no need to discuss its problems. Because the issue remains open, we construe the *Miranda* opinion as not foreclosing recognition of a limited exception to its rules of custodial interrogation in order to meet emergencies affecting human life. We conclude, therefore, that exigent circumstances may excuse compliance with the *Miranda* rules in instances of overriding need to save human life or to rescue persons whose lives are in danger.

What is the scope of this exception, and what elements make up a valid instance of exigent circumstances? . . .

. . . .

. . . [W]e deduce that an emergency sufficient to excuse the *Miranda* requirements contains the following elements:

1. Urgency of need in that no other course of action promises relief;

2. The possibility of saving human life by rescuing a person whose life is in danger;

3. Rescue as the primary purpose and motive of the interrogators."[6]

[6] Indeed, the Court of Appeals of Maryland has recognized an exception to the mandatory Maryland prompt presentment rule "to obtain information likely to be a significant aid in averting harm to persons . . . ." Johnson v. State, 282 Md. 314, 329 (1978). Later, in Lebedun v. State, 283 Md. 257, 266-78 (1978), the Court of Appeals of Maryland carved out an emergency exception to the search warrant requirement where police officers, who were present in a motel room to protect paramedics and to investigate possible criminal activity related to the use of drugs by persons suffering from an overdose of drugs, arrested the occupants.

All three elements were satisfied in the instant case. The correctional officers knew Respondent controlled a handgun. They indicated, and the trial judge agreed, that to confront anyone other than Respondent with that knowledge would have been to risk losing the opportunity to retrieve the gun. Upon learning after the weapon's retrieval of the existence of a plan to escape, no other course of action other than to question Respondent further of the details promised relief in view of Respondent's prior cooperation. It is obvious that removing a weapon from an inmate's possession would have resulted in the "possibility of saving human life." The same is true as to thwarting a planned escape; indeed, Britton testified that Respondent stated, while speaking of the planned escape, that "he couldn't see nothing happen to . . . [Correctional Officer] Dardeen, he wasn't going to see Mr. Dardeen get hurt." Young's testimony indicates that the primary purpose of the pre-retrieval questioning was to secure the institution and not to prosecute Respondent. "It is inferable that the same primary purpose servaded the post-retrieval questioning because the correctional officers were not aware of the escape plan until after the retrieval of the gun and could not have known without further questioning of Respondent whether the emergency dissipated upon the gun's retrieval.

CONCLUSION

The decision of the Court of Appeals of Maryland reflects a view which is not accepted at least by the Court of Appeal of California, speaking for the State of California and reflecting a trend toward emergency exceptions to constitutional requirements, and presents a constitutional issue of first impression for this Court. Additionally, Petitioner respectfully urges that, in view of Sup. Ct. R. 19 (a), a Writ of Certiorari be issued to review the decision of the Court of Appeals of Maryland because, as in *Wolff v. McDonnell*, 418 U.S. 539, 542 (1974), the decision "raises important questions concerning the administration of a state prison."

Respectfully submitted,

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APPENDIX A

In The
Court of Appeals of Maryland

No. 54

September Term, 1979

Conrad Whitfield and Nigel Antonio Little

v.

State of Maryland

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*Murphy, C.J., Smith, Digges, Eldridge, *Orth, Cole, Davidson, JJ.*

Opinion by Digges, J. Murphy, C.J., and Smith, J., concur in part and dissent in part.

Filed: February 15, 1980

We granted certiorari in this case to address what has been described as "probably the most difficult and frequently raised question in the wake of *Miranda* — what

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* Orth, J., participated in the hearing of the case and in the conference in regard to its decision but retired prior to the adoption of the opinion by the Court.

constitutes the 'in custody interrogation' or 'custodial questioning' which must be preceded by the *Miranda* warnings."[1] Specifically, we are asked to decide: (1) whether, in the absence of *Miranda* admonitions, statements elicited from the petitioner, a prison inmate, during interrogations conducted by jail officials, in the circumstances present here, could properly be admitted into evidence in a criminal prosecution of the inmate? and (2) whether a belief by prison officials that a gun was hidden within the jail, creates an emergency which excuses a failure to give *Miranda* warnings and permits the use of statements obtained from the questioned inmate in a criminal prosecution against him? Because we conclude that the inquiry occurred in the type of custodial setting condemned by the Supreme Court in *Miranda*, and since we can find no exception to its requirements in emergencies such as the one that existed here, we vacate petitioner's conviction and grant him a new trial.

I.

The events which give rise to this appeal took place in the early part of July 1976. At that time, Nigel Little,[2] a cadet guard at the Baltimore City jail, surreptitiously delivered a handgun to petitioner Conrad Whitfield, who apparently intended to use the weapon to escape from the prison. The petitioner's plans were thwarted, however, when Thomas Brown, a fellow resident at the jail, revealed to his attorney, Marshall Stewart, Esquire, that he had

[1] Kamisar, "'Custodial Interrogation' within the meaning of Miranda," in *Criminal Law and the Constitution: Sources and Commentaries* 335 (1968). The reference to *Miranda* is to the Supreme Court decision of Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

[2] While Little is listed as an appellant in this case, his conviction below is not before us. At oral argument, we were informed by the Public Defender that although Whitfield and Little had jointly petitioned this Court for review, our grant of certiorari restricted to the *Miranda* issue, in effect, dismissed Little as a party to the appeal because only Whitfield was claiming a violation of those rights.

information concerning the presence of a pistol in the Baltimore City jail and wished to speak with someone about it. The attorney, who incidentally also represented Whitfield on unrelated criminal matters, told the authorities about this conversation, and the police relayed the information to the warden of the jail.

Upon learning of the gun's presence within the jail walls and that Whitfield was somehow connected with it,[3] correctional officers Major Howard Parks, Captain Calvin Young and Lieutenant William Britton set out "to locate Mr. Whitfield [, who apparently was permitted to move unescorted around portions of the jail,] and confront him with the information." Shortly after beginning their search, the three officers located the petitioner as he was alighting from a prison elevator with some fellow inmates. Without explanation, Whitfield was directed to accompany Officers Young and Britton to the isolation wing of the jail. Once inside the secluded confines of this area, which at the time was unoccupied by others, the officers immediately confronted petitioner with the fact that they knew "that he was in possession of a weapon within the institution." Captain Young testified that no *Miranda* warnings were given to Whitfield prior to or during his interrogation. The captain justified this failure by stating this his "immediate objective" was "[t]o obtain the weapon and get it out of the institution"; consequently, the witness explained that he approached Whitfield in the following manner: "as if you emphatically know that they are guilty of a said situation . . . [so that] the shock of your presenting it to them immediately will get a positive response." When asked about the gun, Whitfield at first denied having any knowledge concerning it. Britton and Young persevered with "that line of questioning for a few minutes," but petitioner continued to insist that he did not know what they were talking about. Finally, Lt. Britton

[3] It is unclear from the record just how the Baltimore City jail officials learned of the petitioner's involvement, since both Brown and Stewart testified that they had not mentioned Whitfield's name to the authorities.

> told [Whitfield] that Cadet Little and some police officers from the Baltimore City Police Department were in the Deputy Warden's office and knew everything about the handgun being in the institution and it would be best for all concerned if he would turn the gun in and prevent anybody from getting hurt.[4]

Whitfield responded to that statement by admitting knowledge of the weapon and told the officers "that he would have to retrieve the gun from a given area of the institution, and that he would have to go by himself to retrieve [it]." Permission was granted Whitfield to fetch the gun, and upon returning five to ten minutes later to the isolation wing he handed the weapon to Britton and Young.

With the pistol safely in hand, Lt. Britton escorted the petitioner to Major Park's office for further questioning. There, the lieutenant offered Whitfield a cup of coffee, and, even though the full *Miranda* warnings were again not given to him, petitioner was informed that "he could contact his attorney." The prisoner used the phone and apparently attempted to call Mr. Stewart, but was informed that at the time the attorney was not in his office. However, almost immediately after completing the phone call, and prior to any additional questioning, a Mr. Claus, Mr. Stewart's office assistant, arrived at Major Park's office. In Mr. Claus's presence, the officer questioned petitioner concerning both the already recovered gun and the alleged escape plan. During the ensuing five to ten minutes, Whitfield verbally "laid everything out, . . . what was supposed to have transpired." Subsequently he was indicted for a handgun violation, Md. Code (1957, 1976 Repl. Vol.), Art. 27, § 36B(b), and for conspiracy to escape, *id.* at § 139(a).

[4] While not raised by the petitioner, we note that the promise contained in Lt. Britton's statement may raise questions of voluntariness under nonconstitutional Maryland criminal law as recently discussed in Hillard v. State, 286 Md. 145, 150-54, 406 A.2d 415, 418-20 (1979).

A pretrial hearing was held in the Criminal Court of Baltimore where, among other things, petitioner moved to suppress both oral statements made because of the failure of the jail authorities to comply with the dictates of *Miranda*. The court (Allen, J.) did not determine whether the statements sought to be suppressed were improperly elicited during a "custodial interrogation" within the meaning of *Miranda*, for in its view, "it would be stretching it a great deal if we required prison officials acting in a very dire emergency to accord to prisoners under their care the rights guaranteed by the Miranda case." When subsequently he was convicted of the handgun and conspiracy charges, Whitfield appealed this ruling to the Court of Special Appeals. That court affirmed the trial court's decision because it agreed that the emergency facing the prison officials here excused compliance with *Miranda*'s dictates. *Whitfield v. State*, 42 Md. App. 107, 125-28, 400 A.2d 772, 783-85 (1979). In an attempt to accommodate its decision to the confines of *Miranda*, the court reasoned that:

> The questioning of Whitfield *was not an interrogation, looking toward prosecution, but an on-the-scene investigation for a deadly weapon* which presented a threat to the security of the jail. . . . [A] fair reading of the record discloses that the correctional officers were preoccupied more so with the recovery of the gun, whether there were other guns inside the jail, and the details of the escape attempt, than with the apprehension and punishment of Whitfield. [*Id.* at 128, 400 A.2d at 784 (citation omitted) (emphasis added).]

We disagree.

II.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), the United States Supreme Court held:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the

privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. [*Id* at 478-79.]

These principles stemmed from the Supreme Court's basic concern that the "compulsion inherent in custodial surroundings" may endanger an individual's fifth amendment right to be free from compelled self-incrimination. *Id.* at 457-58. *See Beckwith v. United States,* 425 U.S. 341, 345-46, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976); *Mills v. State,* 278 Md. 262, 267, 363 A.2d 491, 494 (1976); *Myers v. State,* 3 Md. App. 534, 537, 240 A.2d 288, 291 (1968). See also Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S. Car. L. Rev. 699, 700 (1974). While the warnings designed to overcome that danger are only "prophylactic rules" rather than constitutional dictates, *Michigan v. Tucker*, 417 U.S. 433, 439, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974), the purpose underlying these rules should nevertheless be kept in mind when applying *Miranda* to any given set of circumstances. In this regard, we observe that statements which are obtained from a defendant during questioning conducted without the benefit of *Miranda* warnings, as

concededly occurred here, need only be excluded from evidence if they "flow from a 'custodial interrogation' within the meaning of *Miranda*." *Vines v. State*, 285 Md. 369, 374, 402 A.2d 900, 903 (1979). Such interrogation is defined by the Supreme Court as any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona, supra*, 384 U.S. at 444 (footnote omitted). This has been held by that Court to include "questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense, *Mathis v. United States*, 391 U.S. 1, 20 L. Ed. 2d 381, 88 S. Ct. 1503 (1968), and to questioning taking place in a suspect's home, after he had been arrested and is no longer free to go where he pleases, *Orozco v. Texas*, 394 U.S. 324, 22 L. Ed. 2d 311, 89 S. Ct. 1095 (1969)." *Oregon v. Mathiason*, 429 U.S. 492, 494-95, 50 L. Ed. 2d 714, 97 S. Ct. 711 (1977) (*per curiam*).

In contrast to custodial inquiry is "the traditional function of police officers in investigating crime . . . [to conduct] [g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process," which does not require the use of the *Miranda* safeguards. *Miranda v. Arizona, supra*, 384 U.S. at 477. An on-the-scene investigation is normally envisioned as encompassing a general exploration into suspicious circumstances in order to determine if a crime has been committed; or as encompassing a probe into known crime which lacks an identifiable suspect. *See, e.g., United States v. Wiggins*, 509 F.2d 454, 459-60 (D.C. Cir. 1975); *United States v. Sadler*, 458 F.2d 906, 908 (10th Cir. 1972); *State v. Frizzell*, 207 Kan. 393, 485 P.2d 160, 163-64 (1971); Lederer, *Miranda v. Arizona — The Law Today* 78 Mil. L. Rev. 107, 135-36 (1978). *See generally* Annot., *What Constitutes "Custodial Interrogation" Within Rule of Miranda v. Arizona Requiring that Suspect be Informed of His Federal Constitutional Rights Before Custodial Interrogation*, 31 A.L.R.3d 565 § 3 (1970 & 1979 Supp.) (citing cases). As is often the case, the parties here

have characterized the questioning of Whitfield as falling within one or the other of these mutually exclusive categories. Thus, our primary task today is to determine whether the questioning of petitioner by officers Britton and Young was a "custodial interrogation." However, prior to addressing this issue, we need to consider the State's contention that *Miranda* is inapplicable to emergencies such as existed at the time of the questioning in the Baltimore City jail, for if this is so, then it will be unnecessary for us to delineate the type of interrogation that then occurred.

Relying on dicta in *Hunt v. State,* 2 Md. App. 443, 447, 234 A.2d 785, 787-88 (1967), as well as a handful of decisions from other jurisdictions, *People v. Sanchez,* 65 Cal. 2d 814, 423 P.2d 800, 56 Cal. Rptr. 648 (1967); *State v. Archible,* 25 N.C. App. 95, 212 S.E.2d 44 (1975); *State v. Abbott,* 21 Utah 2d 307, 445 P.2d 142 (1968); *State v. Persinger,* 72 Wash. 2d 561, 433 P.2d 867 (1967), *cert. denied,* 393 U.S. 864 (1968); *State v. LaRue,* 19 Wash. App. 841, 578 P.2d 66 (1978), the Court of Special Appeals, in upholding the trial court's ruling, determined that compliance with *Miranda* by prison authorities is excused by the emergency erupting from the "unusual explosive circumstances" of a gun in the possession of an inmate. *Whitfield v. State, supra,* 42 Md. App. at 126-28, 400 A.2d at 783-85. We find, however, that we cannot agree with this reasoning because to do so would allow the exigency needs of institutional security, although at the time permissible in resolving the emergency, to be later used so as to deprive a person of his constitutional rights in the course of providing a fair trial when that emergency no longer existed.

We begin our discussion of why we reach this conclusion by noting that the United States Supreme Court itself has not placed any per se limitation on where and when the *Miranda* safeguards should be applied. In fact, they specifically expressed just the opposite position when explaining the need for such protections:

> Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. [*Miranda v. Arizona, supra,* 384 U.S. at 467 (emphasis added).]

Nor do we find the cases relied on by the intermediate appellate court persuasive in resolving the issue we now confront. While these decisions do contain broad dicta to the effect that a threat to the security of a prison justifies non-compliance with *Miranda* and the subsequent use of any statements obtained in prosecuting their author, these holdings were based on the fact that the inmate-defendants in the situations present in those cases were not "in custody" or had not been "interrogated."[5] *See*

[5] Our research uncovered only one jurisdiction — California — which has adopted a true emergency exception to *Miranda*. In that state, the intermediate appellate court, in decisions rendered post-*Miranda*, relying on the pre-*Miranda* ruling of the California Supreme Court in People v. Modesto, 62 Cal. 2d 436, 398 P.2d 753, 42 Cal. Rptr. 417 (1965), held that, in cases involving kidnapping, the concern of law enforcement agents in finding a kidnapping victim outweighs the fifth amendment rights of the kidnapper. *See* People v. Riddle, 83 Cal. App. 3d 563, 148 Cal. Rptr. 170, 176-78 (Ct. App. 1978), *cert. denied*, 440 U.S. 937 (1979); People v. Dean, 39 Cal. App. 3d 875, 114 Cal. Rptr. 555, 559-60 (Ct. App. 1974). As the court in *Dean* put it:

> [E]ven more basic than the right of a citizen not to be compelled to incriminate himself is the right of a citizen to his *life*. . . .
>
> . . . While life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent. . . . While we do not countenance the rubber hose to obtain the answers, we see no wrong in asking the type of questions found herein.
>
> The easy answer is to decide that the police are under a duty to ask questions concerning the location of the victim but that none of the defendant's answers may be used against him in a court of law. This would seem to protect both the victim and the accused. What about the "fruit of the poisonous tree" doctrine? Its application could well free the accused and basic justice would be wanting.
>
> While a premium must be placed on rescue of the victim, this must not occur in a setting that will merely turn the

People v. Sanchez, supra, 423 P.2d at 806 (pre-*Miranda* decision; guard called to scene of stabbing and asked crowd of inmates "who did this and why" — held not "in custody" and no process of interrogation had yet been undertaken); *State v. Archible, supra*, 212 S.E.2d at 46 (questioning of guard; noncustodial inquiry into suspected criminal activity; freedom of movement not restricted since defendant was allowed to leave place of questioning); *State v. Persinger, supra*, 433 P.2d at 868 (defendant found on roof of prison asked why he didn't follow other escaping inmate, purely "conversational inquiry," product of "spontaneous, human curiosity"); *State v. LaRue, supra*, 578 P.2d at 69 (questioning not during accusatory stage). Additionally, these cases, as did *Hunt v. State, supra*, turned to a degree on an inappropriate interpretation of *Miranda* — that whether interrogation is proscribed under *Miranda* depends on the reason why the questions were asked — one rejected by the Supreme Court in a later case. *See Mathis v. United States*, 391 U.S. 1, 4, 20 L. Ed. 2d 381, 88 S. Ct. 1503 (1968). For a fuller discussion, see Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?*, 67 Geo. L.J. 1, 9 (1978).

While it has often been stated that "as a general matter, lawful detention or imprisonment 'necessarily makes unavailable [to an inmate] many rights and privileges of the ordinary citizen,'" *Thomas v. State*, 285 Md. 458, 463, 404 A.2d 257, 260 (1979) (quoting from *Wolff v. McDonnell*, 418 U.S. 539, 555, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974)), the only constitutional rights of an inmate which this Court, or the United States Supreme Court, has held to "be diminshed by the needs and exigencies of the institutional environment" are those protected by either the first or fourth amendments. *See, e.g., Thomas v. State, supra*, 285 Md. at 463, 468, 404 A.2d at 260, 263 (prison security justified warrantless search); *Bell v. Wolfish*, 441 U.S. 520,

criminal loose again to work his evil upon others. The kidnaper must be stopped and the victim saved. [*Id.* at 559-60.]

545-47, 550-59, 60 L. Ed. 2d 447, 472-74, 476-81, 99 S. Ct. 1861, 1877-78, 1880-84 (1979) (restrictions on incoming publications reasonable under 1st amendment; searches of inmate living quarters reasonable under 4th amendment); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129-32, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977) (1st amendment not violated by restrictions on prisoner solicitations).[6] The limitations as to these rights of prisoners are based on the longstanding legal and historical interpretation of such guarantees: the first amendment right of free speech is subject to *reasonable* time, place and manner restrictions, *e.g., Bell v. Wolfish, supra*, 441 U.S. at 552; *Grayned v. City of Rockford*, 408 U.S. 104, 115-16, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); and the protection of the fourth amendment results only when a person can claim a *reasonable* expectation of privacy that has been invaded by the government, *e.g., Smith v. Maryland*, ___ U.S. ___, ___, 61 L. Ed. 2d 220, 226, 99 S. Ct. 2577 (1979); *Thomas v. State, supra*. Limitations similar to these have never been imposed on the fifth and sixth amendment rights of citizens. Moreover, in the past, the Supreme Court has drawn distinctions between the fourth amendment rights of individuals and the guarantees contained in the fifth and sixth amendments, holding that the former may be more easily waived than the latter because

> [t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment . . . . The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. [*Schneckloth v. Bustamonte*, 412 U.S. 218, 241-42, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).]

Thus, the fifth amendment guarantee against compulsory self-incrimination, being different in nature from other constitutionally established individual liberties, should

[6] The procedural due process rights of prisoners have also been restricted. *See* Wolff v. McDonnell, 418 U.S. 539, 561-62, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974).

not, in our opinion, be diminished by the needs of penal administration to the extent that such statements may be utilized in a criminal prosecution.

At the suppression hearing in the trial court in this case, the State asserted that its position was not that the exigencies of prison life justified the extraction of incriminating information from inmates; rather, it urged that the appropriate test to be employed in determining if it may be used in the criminal prosecution was whether the statement had been voluntarily made, and not whether there was technical adherence to the warning requirements of *Miranda*. This argument, however, ignores one of the chief underpinnings of the Supreme Court's rationale for requiring the warnings — statements made during an in-custody interrogation are inherently untrustworthy and "[u]nless adequate protective devices are employed to dispel the compulsion . . ., no statement obtained from the defendant can truly, be the product of his free choice." *Miranda v. Arizona, supra,* 384 U.S. at 457-58. *See State v. Kidd,* 281 Md. 32, 36, 375 A.2d 1105, 1108, *cert. denied,* 434 U.S. 1002 (1977) ("*Miranda* impressed procedural safeguards on the traditional test of voluntariness").

Finally, the State attempts to justify an extension of the balance struck in *Thomas v. State, supra,* to interrogations by contending that if it was required to inform an inmate, such as Whitfield in the circumstances here, that he had a right to remain silent and consult with an attorney, then their ability to adequately maintain the safety and security of the jail would be greatly hampered. While there is probably some validity to the State's assertion that in some situations they would not receive the necessary information, we find it is unpersuasive. Implicit in their argument is the assumption that criminal prosecution of an inmate, following the end of the emergency, is also imperative to maintain prison security. While we recognize that prison security may be enhanced through prosecution of those who attempt to penetrate it, this objective cannot be allowed to destroy the constitutional

protections designed to ensure a fair trial. If the State feels that the emergency before it requires the use of the psychological techniques of persuasion employed here in order to obtain immediate information, then it may do so, but at the cost of foregoing the affirmative use of this information at a subsequent criminal trial. While this result to some may seem harsh, we believe it is necessary if we are to protect the fifth amendment rights of prisoners. Moreover, the choice which confronts the State here is no different from that which it makes when granting immunity — letting one individual go unprosecuted in order to obtain evidence to prosecute another individual or to accomplish some other societal benefit. This analysis is similar to that followed by many of our sister states in attempting to accommodate the constitutional rights of prisoners and the law enforcement interests of the state when the facts of a case constitute both a violation of prison rules and a crime, *i.e.*, permitting the State to discipline the inmate and also criminally prosecute him, while fully protecting his right to defend himself at the disciplinary hearing and yet maintain his fifth amendment right against self-incrimination. *See, e.g., Avant v. Clifford,* 67 N.J. 496, 341 A.2d 629 (1975) (excellent discussion of the many court decisions around the country, as well as the issues involved in cases of this type). *See generally* Turner and Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime,* 21 Buffalo L. Rev. 759 (1972). Thus, we hold that *Miranda* applies to prison inmates to the same extent that it does to all other citizens. Having reached this conclusion, we now turn to the question of whether Whitfield was subjected to custodial interrogation within the meaning of that Supreme Court decision.

III.

A determination of whether custodial questioning has occurred requires, in the first instance, a finding that the defendant was in "custody," as that term is defined in the *Miranda* opinion. This is by far the most litigated aspect of

Miranda, and an issue on which the Supreme Court has provided little guidance. *Compare Oregon v. Mathiason, supra*, 429 U.S. at 494-95 (parolee questioned at police station not in custody because he was free to leave) *and Beckwith v. United States, supra*, 425 U.S. at 347 (suspect in tax fraud investigation questioned at a private home where he occasionally stayed was not in custody) *with Orozco v. Texas*, 394 U.S. 324, 327, 22 L. Ed. 2d 311, 89 S. Ct. 1095 (1969) (suspect questioned in his bedroom was under arrest, not free to leave, and thus in custody) *and Mathis v. United States, supra*, 391 U.S. at 4-5 (suspect questioned about tax fraud while imprisoned on another charge was in custody). Petitioner contends, however, that one of these decisions — *Mathis, supra* — is dispositive on the issue of his custody within the meaning of *Miranda*, but, as we view Whitfield's situation, it is unnecessary to so characterize the *Mathis* holding.

In *Mathis*, the defendant was questioned by an agent of the Internal Revenue Service while he was in state prison serving a sentence on an unrelated matter, and his statements, made without receiving the *Miranda* warnings, were subsequently admitted against him in a criminal tax prosecution. In reversing the conviction, the Supreme Court held that (1) "custody" under *Miranda* was not dependent on the reason why the person questioned was in custody, and (2) the warnings are required to be given even if the interrogation that was conducted lacks prosecutorial intent at the time. *Id.* at 4-5. Petitioner argues that a fair reading of *Mathis* requires a reversal of his conviction because, in his view, it stands for the proposition that being incaracerated, in and of itself, is sufficient restraint to require the *Miranda* warnings whenever any questions are asked of an inmate. Later decisions by the Supreme Court seem to support this interpretation, for when they discuss *Mathis* and the custody concept, the Court states that it "squarely grounded its holding on the custodial aspects of the situation," *i.e.*, being in prison. *Beckwith v. United States, supra*, 425 U.S. at 347. *See Oregon v. Mathiason, supra*, 429 U.S. at 494. While a few

courts have been willing to interpret *Mathis* in this broad fashion — that prison confinement equals custody — *see United States v. Redfield*, 402 F.2d 454, 455 (4th Cir. 1968) (*per curiam*); *Blyden v. Hogan*, 320 F. Supp. 513, 519 (S.D. N.Y. 1970); *People v. Woodberry*, 265 Cal. App. 2d 351, 71 Cal. Rptr. 165, 168 (Dist. Ct. App. 1968); *People v. Faulkner*, 90 Mich. App. 520, 282 N.W.2d 377, 379 (1979); *State v. LaRue*, 19 Wash. App. 841, 578 P.2d 66, 69 (1978); *see generally, Inmates of Attica Correctional Facility v. Rockefeller*, 404 U.S. 809, 30 L. Ed. 2d 40, 92 S. Ct. 35 (1971) (Douglas dissent from denial of temporary restraining order); Lederer, *Miranda v. Arizona — The Law Today* 78 Mil. L. Rev. 107, 129 n. 82 (1978); Smith, *supra*, 25 S. Car. L. Rev. at 725-28, we find that it is unnecessary to do so here since under the general test to be utlized in deciding when one is in "custody," which we announce today, it is clear that Whitfield was "deprived of his freedom of action" in the *Miranda* sense at the time of questioning, without regard to the fact that he was otherwise incarcerated when it occurred.

Deciding when a person has been significantly deprived of his freedom of action so as to be in custody within the meaning of *Miranda* depends on the factual setting surrounding the interrogation in each case. This issue has frequently been confronted by the courts of this country, and a variety of tests have been developed as an aid for making that decision. *See, e.g., United States v. Gibson*, 392 F.2d 373, 376 (4th Cir. 1968) (subjective intent of interrogating officer to arrest suspect); *Windsor v. United States*, 389 F.2d 530, 534 (5th Cir. 1968) (degree of focus); *State v. Intogna*, 101 Ariz. 275, 419 P.2d 59, 65 (1966) (subjective belief of suspect); *Reeves v. State*, 258 Ark. 788, 528 S.W.2d 924, 926-27 (1975) (objective); *People v. P (Anonymous)*, 21 N.Y.2d 1, 286 N.Y.S.2d 225, 233 N.E.2d 255, 260 (1967) (reasonable belief); *see generally* Lederer, *supra*, 78 Mil. L. Rev. at 130-33. The majority of courts which have explicitly addressed this question, however, have adopted an objective reasonable person approach to determining custody. *See, e.g., Borodine v. Douzanis*, 592

F.2d 1202, 1206 (1st Cir. 1979); *United States v. Luther*, 521 F.2d 408, 410 (9th Cir. 1975) (*per curiam*); *Iverson v. State of North Dakota*, 480 F.2d 414, 422 (8th Cir.), *cert. denied*, 414 U.S. 1044 (1973); *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969); *Hunter v. State*, 590 P.2d 888, 894-95 (Alaska 1979); *State v. Mumbaugh*, 107 Ariz. 589, 491 P.2d 443, 448 (1971) (en banc); *People v. Arnold*, 66 Cal. 2d 438, 58 Cal. Rptr. 115, 426 P.2d 515, 521 (1967); *People v. Parada*, 533 P.2d 1121, 1123 (Colo. 1975) (en banc); *State v. Lewis*, 373 A.2d 603, 607 (Me. 1977); *Beason v. State*, 453 P.2d 283, 286 (Okla. Cr. 1969); *State v. Paz*, 31 Or. App. 851, 572 P.2d 1036, 1040 (1977) (en banc); *Commonwealth of Pennsylvania v. Fisher*, 466 Pa. 216, 352 A.2d 26, 28 (1976); *State v. Hohman*, 136 Vt. 341, 392 A.2d 935, 940 (1978). See also Annot., *What Constitutes "Custodial Interrogation" within Rule of Miranda v. Arizona Requiring that Suspect be Informed of his Federal Constitutional Rights Before Custodial Interrogation*, 31 A.L.R. 3d 565 (1970 & 1979 Supp.), where most, if not all cases on this question are catalogued; 1 B. George, *Criminal Procedure Sourcebook* 361 (1976); Smith, *supra*, 25 S. Car. L. Rev. at 711-13. Under this test:

> [C]ustody occurs if a suspect is led to believe, as a reasonable person, that he is being deprived or restricted of his freedom of action or movement under pressures of official authority. * * * [T]he custody requirement of *Miranda* does not depend on the subjective intent of the law enforcement officer-interrogator but upon whether the suspect is physically deprived of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation. * * * [*Myers v. State*, 3 Md. App. 534, 537, 240 A.2d 288, 290 (1968).]

The general inquiry to be made, as expressed in a frequently quoted opinion by the Second Circuit, is whether

> in the absence of actual arrest something [is] said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so. [*United States v. Hall, supra*, 421 F.2d at 545.]

Thus, some actual indication of custody must exist, such that a reasonable person would feel he was not free to leave and break off police questioning. *See Cervantes v. Walker*, 589 F.2d 424, 428 (9th Cir. 1978). In making this factual evaluation, a court should look to

> those facts intrinsic to the interrogation: when and where it occurred, how long it lasted, how many police were present, what the officers and the defendant said and did, the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or as a witness. Facts pertaining to events before the interrogation are also relevant, especially how the defendant got to the place of questioning — whether he came completely on his own, in response to a police request, or escorted by police officers. Finally, what happened after the interrogation — whether the defendant left freely, was detained or arrested — may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning. [*Hunter v. State, supra*, 590 P.2d at 895 (footnote omitted).]

See, e.g., Cervantes v. Walker, supra, 589 F.2d at 427-28 (factors include "the language used to summon him, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and pressure exerted to detain him").

Turning now specifically to the case at hand, we find that the circumstances surrounding the questioning of Whitfield at both interrogations lead to the conclusion that they were conducted while he was in "*Miranda* custody." At the interrogation in the isolation wing, where he confirmed the existence of the gun, the following conceded-

ly took place: Whitfield, as the prime suspect, was the only inmate questioned; the guards separated him from his fellow inmates and directed that he accompany them; he was taken to the isolation wing of the jail to be alone with his interrogators; the testimony of the officers was that the petitioner was immediately confronted with knowledge of his guilt in order to "shock" the necessary information out of him; when their first line of questioning did not reveal the gun's whereabouts, the officers switched tactics and informed petitioner of the evidence amassed against him so as to demonstrate the futility of his position; and while Whitfield was permitted to leave the interrogation scene at its conclusion (a key factor mentioned by the Supreme Court in *Oregon v. Mathiason, supra*) he was only given his freedom in order to retrieve the weapon, and once he had done that, he was again deprived of his freedom of movement. By the time the second interrogation took place in Major Park's office, Whitfield was clearly in custody and was being questioned simply to obtain additional information concerning the presence of the weapon within the prison walls. Thus, we believe it apparent that during both sets of questioning Whitfield was in *"Miranda* custody."

Once such custody is established, a court must still determine whether an "interrogation" took place before a violation of *Miranda* exists. "Interrogation," like "custody," is not easily defined, although in its usual sense, it "refers to police questioning designed to elicit a response from a suspect." Lederer, *supra,* 78 Mil. L. Rev. at 134. Of course, not all questioning by law enforcement officials of one in custody is tantamount to an interrogation in the *Miranda* sense. *See Vines v. State,* 285 Md. 369, 375-76, 402 A.2d 900, 903-04 (1979). For example, in a recent opinion by Judge Orth, this Court noted: "There seems to be general agreement . . . that *Miranda* does not apply to 'administrative questioning,' the routine questions asked of all arrestees who are 'booked' or otherwise processed." *Id.* at 376, 402 A.2d at 904. However, except for this type of questioning, if custody is found to exist,

then any examination likely to lead to incriminating statements will be a *"Miranda* interrogation."

The State responds to this assertion by urging that even if there was custody under *Miranda*, there existed in both questionings no *Miranda* interrogation of Whitfield because the officers' primary concern when they examined the petitioner was to secure the prison area by locating the gun, and and not an attempt to elicit statements for criminal prosecution. While we have no doubt that the principle purpose of the guards, at least at first, in conducting these interrogations was to locate and remove the weapon and any others that may have been involved from the institution, we do not believe that the subjective intent, albeit the primary objective, of the examiner should control the determination of when interrogation within the meaning of *Miranda* has occurred. The Supreme Court has rejected a similar argument to that made here by the State in *Mathis v. United States, supra.* Consequently, it seems to us, in the words of Professor Kamisar

> that so long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police "interrogation" *regardless of its primary purpose or motivation*, and that if it otherwise qualifies as "interrogation," *it does not become something else* because the interrogator's main purpose is [something other] than the procuring of incriminating statements, even though self-incrimination may be foreseen as a windfall. [Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When does it Matter?*, 67 Geo. L.J. 1, 9 (1978) (footnote omitted) (emphasis in original).]

Accord, Proctor v. United States, 404 F.2d 819, 820-21 (D.C. Cir. 1968). It follows from what we have just said that the mere fact that Officers Britton and Young did not intend to elicit incriminating information from Whitfield for prosecutorial purposes does not mean that they did not interrogate him in the *Miranda* sense.

Finally, the State maintains that this questioning was part of a general on-the-scene investigation rather than a custodial interrogation. This argument also fails. As we indicated earlier in this opinion, the concepts of on-the-scene questioning and custody are mutually exclusive; if custody exists, as it does on the facts here, then an on-the-scene investigation cannot be said to have occurred. Such a scene investigation involves a general fact-finding mission, without significantly interferring with the right of movement of the person or persons to whom the questions are directed. *See, e.g., Lowe v. United States*, 407 F.2d 1391, 1394-96 (9th Cir. 1969). In this case, the jail authorities had established the need for police action and their attention had been focused on Whitfield as the one who most likely was criminally responsible. Thus, the inquiry here, from its inception, was not an on-the-scene factual investigation, but a custodial interrogation requiring that the *Miranda* warnings be given.

We conclude, therefore, that, since the *Miranda* warnings should have preceded any interrogation by the jail officials, all statements made by Whitfield prior to these warnings were improperly admitted at his trial, and a new one is required.

Judgment of the Court of Special Appeals reversed and case remanded to it with direction to reverse the judgement of the Criminal Court of Baltimore and remand the case to that court for a new trial. Pursuant to Maryland Rule 882 f, costs are not reallocated as part of the judgment of this court.

APPENDIX B

In The
Court of Appeals of Maryland

No. 54

September Term, 1979

Conrad Whitfield and Nigel Antonio Little

v.

State of Maryland

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*Murphy, C.J. Smith, Digges, Eldridge, *Orth, Cole, Davidson, JJ.*

Opinion by Murphy, C.J., concurring in part and dissenting in part, in which Smith, J., concurs.

Filed: February 15, 1980

Murphy, C.J., concurring in part and dissenting in part:

The Court holds that the jail officials' initial confrontation with Whitfield, *i.e.*, when they first accosted him as he emerged from the jail elevator and brought him to the

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* Orth, J., participated in the hearing of the case and in the conference in regard to its decision but retired prior to the adoption of the opinion by the Court.

isolation room in an effort to ascertain the whereabouts of the gun, constituted a "custodial interrogation" within the contemplation of *Miranda*; and that absent *Miranda* warnings Whitfield's first oral admission that he had knowledge of the weapon, and his subsequent act in retrieving the gun and turning it over to the authorities, was inadmissible in evidence. I do not agree with that conclusion and, therefore, dissent from that part of the majority holding which would exclude this evidence from being introduced upon retrial of the case.

Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968), makes clear that the principles of *Miranda* apply to a custodial interrogation conducted in a prison and that it makes no difference that the interrogators are correctional officials, rather than police officers. I agree that Whitfield's initial oral statement admitting knowledge of the weapon was made while he was in "custody" in a *Miranda* sense, *i.e.*, he was deprived or restricted of his normal freedom of action or movement within the jail under pressure of official authority. I do not agree, however that the oral statement made at that initial confrontation was responsive to an "interrogation" within the contemplation of *Miranda* since the inquiry was not made to elicit evidence of a crime but rather as part of an investigation limited in purpose to the location of a weapon which presented a real threat to the internal security of the prison. An individual may be in custody, but not subjected to an "interrogation" in the *Miranda* sense, as the majority recognizes. Nothing in *Mathis* or in *Miranda* itself supports the majority's position that *any* custodial examination that has the potential to lead to an incriminating statement is a *Miranda*-type interrogation; nor does either of those cases equate an "interrogation" with an inquiry of an inmate concerning suspected breaches of internal prison security, and this is so even though the suspected breach may also, if established, constitute evidence of a crime. In effect, the Court has extended *Miranda* to foreclose an inquiry concerning the maintenance of internal prison security unless the inmate

is first given the full panoply of *Miranda* warnings, including the admonition that he may refuse to talk to prison authorities about the matter and may have a lawyer present with him if any such inquiry is actually conducted.

The majority seemingly recognizes that the concern of the jail authorities in the initial confrontation with Whitfield was to obtain knowledge of the gun's location in order to secure the safety of the jail, rather than to elicit admissions for use at a criminal prosecution. In this regard, it should be noted that there was no questioning of Whitfield at that time concerning his alleged escape plan; rather the inquiry was limited and singular in purpose — to locate the gun and thus to reestablish prison security and discipline. In these circumstances, it makes no sense to conclude, as the majority does, that no inquiry may be made of a prisoner without prior *Miranda* warnings if there is a possibility that evidence relevant to a criminal prosecution may result. The majority's conclusion that the State may make the inquiry without giving *Miranda* warnings but must forego use of that relevant evidence is both an unwarranted extension of *Miranda's* holding and a needless price to exact in order to maintain internal prison security and discipline.

The cases supporting the proposition that inquiry of the type and for the singular purpose initially conducted in this case does not constitute "interrogation" within the meaning of *Miranda*, upon which the Court of Special Appeals relied in its opinion below — but which the majority finds unpersuasive — make good sense to me and are not at variance with the fundamental import of the *Miranda* decision. Representative of these cases is *State v. LaRue*, 19 Wash. App. 84, 578 P.2d 66 (1978). In that case, LaRue, a prison inmate, was questioned by a correctional officer in a segregation cell immediately following the stabbing of another inmate with a knife. *Miranda* warnings were not given. LaRue was asked as to the location of the knife and he gave an incriminating answer. The guard testified that his purpose in questioning LaRue was to

locate the weapon and secure the prison, rather than to investigate the stabbing. The court held that *Miranda* warnings need not be given in these circumstances because the primary purpose of the inquiry was to find and remove a dangerous weapon from the prison and not to pursue a criminal investigation, *i.e.*, there was no "interrogation" in the *Miranda* sense. Similarly, as the Court of Special Appeals said in *Hunt v. State*, 2 Md. App. 443, 447, 234 A.2d 785 (1967), "interrogation by prison officials with relation to the maintenance of internal security and discipline and to the rules and regulations of the prison, where the thrust and purpose of the interrogation does not relate to the prosecution for any crime, does not fall within the ambit of the *Miranda* decision."

Closely allied with the line of cases represented by *LaRue* and *Hunt* are those which hold that *Miranda* does not foreclose recognition of a limited exception to its rules of custodial interrogation in order to meet emergencies seriously affecting the safety of human life where the intent in making the inquiry and taking the statement is nonprosecutorial at the time. See *e.g. United States v. Castellano*, 500 F.2d 325 (5th Cir. 1975); *People v. Riddle*, 83 Cal. App. 3d. 563, 148 Cal. Rptr. 170 (1978), *cert. denied*, 440 U.S. 937, 99 S. Ct. 1283, 59 L. Ed. 2d 496 (1979); *People v. Dean*, 38 Cal. App. 3d 875, 114 Cal. Rptr. 555 (1974). The lives and safety of many individuals within a prison are placed in serious jeopardy by the presence of a gun within the institution particularly where, as here, the gun is thought to be associated with an escape plan.[1] As Chief Judge Gilbert so cogently observed for the intermediate appellate court in this case (*Whitfield v. State*, 42 Md. App. at 125-126, 128):

[1] In this case, testimony revealed that the pistol was an integral part in an escape plan which was scheduled for Sunday, July 5, only a short time after the prison authorities located the gun. The plan was to "get the drop" on a guard armed with a shot gun down by the gate on the ground level. Once the inmates had his gun, they intended to "make their way" out of the gate and over a small wall.

"Unequivocally, knowledge by prison or jail officials of a gun's being in the hands of an inmate creates an emergency with which they must cope immediately. The situation demands prompt and drastic action. The gun's presence in the penal institution is a 'bell ringer' that an escape attempt is imminent, with the strong possibility that one or more homicides may occur. It behooves the officials to move with alacrity to locate the weapon and confiscate it in order to protect their own lives, the lives of the prison populace, visitors who might be in the institution at the time, and the public generally."

* * * * * *

". . . The questioning of Whitfield was not an interrogation, looking toward prosecution, but an on-the-scene investigation for a deadly weapon which presented a threat to the security of the jail. *State v. LaRue, supra*. Moreover, a fair reading of the record discloses that the correctional officers were preoccupied more so with the recovery of the gun, whether there were other guns inside the jail, and the details of the escape attempt, than with the apprehension and punishment of Whitfield."

* * * * * *

"We hold that where, as here, correctional officers of a penal institution are informed of the existence of a weapon cached within the institution's confines and, consequently, presenting the possibility of an imminent breach of security or a volatile situation, a questioning of a person reasonably likely to have knowledge of the weapon's whereabouts so as to aid the officials in removing the weapon from the institution, or which questioning is designed to secure the safety of the prison population, is permissible. Incriminating statements made by any party involved in the immediate scope of the investigation may, within the sound discretion of the trial judge, be admitted in evidence even though the declarant was not afforded proper *Miranda* warnings before questioning.

"We are not to be understood as sanctioning a *carte blanc, sans Miranda* interrogation by correctional

officials of prison inmates. Prisoners do not surrender all of their constitutional rights when they enter a penal institution. *Miranda* is normally applicable to them as well as to the general populace. Only the most unusual explosive circumstances will excuse *Miranda* compliance."

To hold that *Miranda* precepts were violated at Whitfield's first custodial confrontation with jail officials, and that the incriminatory evidence that flowed from that session was inadmissible in evidence, is to lose sight of overriding institutional needs and objectives, and unnecessarily, and unwisely, to weaken the control of prison officials over the maintenance of prison security and discipline. See *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976), declining to hold that the strictures of *Miranda* were applicable in non-criminal prison disciplinary proceedings. I do, however, fully agree with the Court that the second confrontation between Whitfield and the jail authorities, *i.e.*, that which occurred after the gun had been retrieved and prison security reestablished, constituted a custodial interrogation squarely within the contemplation of *Miranda* and that oral statements obtained at that time from Whitfield were not properly admissible in evidence, since the *Miranda* warnings admittedly were not given to him prior to the interrogation.

Judge Smith authorizes me to say that he concurs in the views here expressed.

In The
Court of Appeals of Maryland

No. 54

September Term, 1979

Conrad Whitfield and Nigel Antonio Little

v.

State of Maryland

MANDATE

To The Honorable The Judges Of The Court Of Special Appeals Of Maryland:

Whereas the case of *Conrad Whitfield and Nigel Antonio Little v. State of Maryland* came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the eleventh day of April, 1979 as appears from the transcript of the record of the said Court of Special Appeals of Maryland which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated July 19, 1979;

Whereas in the September Term, 1979 the said cause came on to be heard before the Court of Appeals of Maryland;

On Consideration Whereof, it was ordered and adjudged on February 15, 1980 by this Court that the judgment of the Court of Special Appeals as to Conrad Whitfield be reversed and case remanded to it with direction to reverse the judgment of the Criminal Court of

Baltimore and remand the case to that Court for a new trial. Pursuant to Maryland Rule 882 f, costs are not reallocated as part of the judgment of this Court; and it was further ordered and adjudged on February 15, 1980 by this Court that the writ of certiorari as to Nigel Antonio Little be dismissed, petition having been improvidently granted.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland this seventeenth day of March, 1980.

James H. Norris, Jr.

Clerk,
Court of Appeals of Maryland.

No costs supplied.

February 15, 1980: Opinion by Murphy, C.J., concurring in part and dissenting in part, in which Smith, J., concurs.

In The
Court of Appeals of Maryland

No. 54

September Term, 1979

Nigel Antonio Little

v.

State of Maryland

ORDER

The petition for writ of certiorari as to Nigel Antonio Little having been granted and heard, it is this 15th day of February, 1980

ORDERED, by the Court of Appeals of Maryland, that the writ of certiorari be, and it is hereby, dismissed, petition having been improvidently granted.

ROBERT C. MURPHY
Chief Judge

APPENDIX B

CONRAD WHITFIELD AND NIGEL ANTONIO LITTLE *v.* STATE OF MARYLAND

[No. 793, September Term, 1978.]

Decided April 11, 1979.

DOUBLE JEOPARDY — *Prosecutorial Overreaching — Bar Against Double Jeopardy Does Not Prevent Retrial Where Prosecutor's Commission Or Omission, Absent Intent To Cause Mistrial, Amounts To Mere Exercise Of Poor Judgment.* The Court *held* that although facts, in case at bar, are indicative of poor judgment on prosecutor's part no discernible intentional misconduct nor gross negligence found sufficient to activate double jeopardy bar to retrial and that violation of professional disciplinary rules not necessarily tantamount to gross negligence or intentional misconduct. pp. 114-115

CRIMINAL LAW — EVIDENCE — *Admissibility Of Other Crimes — Common Scheme Exception To General Rule That Evidence Of Unrelated Crime Is Inadmissible At Trial For Particular Crime — Criteria Necessary To Establish — Evidence Found Sufficient To Meet Requirements Of Common Scheme Or Plan Exception To General Rule For Crimes, Including That Charged In Instant Case, Were So Related To Each Other That Proof Of One Tended To Establish Other.* Evidence adduced clearly established causal relation or natural connection between furtive transporting of narcotics to inmates of city jail (uncharged crime) and present charge of smuggling a deadly weapon into same institution so as to allow rational inference that dealings were a continuing transaction. pp. 120-121, 123

CRIMINAL LAW — EVIDENCE — *Admissibility Of Other Crimes — Common Scheme Or Plan Exception To General Rule — Evidence Of Uncharged Crimes Held To Be Sufficiently Established By Clear And Convincing Proof To Demonstrate Common Scheme — Claim That Probative Value Of Common Scheme Evidence Was Outweighed By Prejudicial Effect Held Without Merit For Although Evidence Of Prior Criminal Acts By Accused Not Charged In Matter For Which He Was Being Presently Tried Was Prejudicial, It Was Clear That Evidence Adduced Was Properly Balanced By Trial Judge And His Finding That Probative Value Outweighed Prejudicial Effect Was Not Erroneous.* pp. 121, 123

CRIMINAL LAW — EVIDENCE — *Admission Of Inculpatory Statement — Miranda Warning — Applicability Of Miranda To On-The-Spot Prison Interrogation To Foil Escape — Where, As Here, Questioning Of Prisoner Was Designed To Secure Safety Of Prison Population After Authorities Were Advised Of Potential Weapon Being Cached Within Confines Of Institution, Any Incriminating Statements Made By Party Involved In*

Immediate Scope Of Investigation Is Admissible Despite Lack Of Miranda Warning To Declarant Before Interrogation — Admission Is Within Sound Discretion Of Trial Judge — Such Holding Held Not To Constitute Carte Blanc Sanction By Correctional Officials To Interrogate Inmates For Prisoners Do Not Relinquish Basic Constitutional Rights Upon Entering Institution — Admission Of Inculpatory Statements Held Not Erroneous. p. 128

H. E. F.

Appeal from the Criminal Court of Baltimore (ALLEN, J.).

Conrad Whitfield was found guilty by a jury of conspiracy and handgun violation and Nigel Antonio Little was found guilty of handgun violation and contraband violation and from judgments entered thereon, they appeal.

Judgments affirmed. Costs to be paid by appellants.

The cause was submitted on briefs to GILBERT, C. J., and MOORE and WILNER.

Submitted by *Arnold M. Zerwitz* and *Michael S. Elder* for appellants.

Submitted by *Stephen H. Sachs, Attorney General, Stephen Rosenbaum, Assistant Attorney General, William A. Swisher, State's Attorney for Baltimore City,* and *Harvey Greenberg, Assistant State's Attorney for Baltimore City,* for appellee.

GILBERT, C. J., delivered the opinion of the Court.

A cadet guard at the Baltimore City Jail surreptitiously carried a handgun into the jail and delivered it to an inmate who intended to use the weapon to effect an escape. The plot was revealed before the escape occurred. As a result, the appellants, Conrad Whitfield (Whitfield), Nigel Little (Little), and Peteta Davis (Davis) [1] were indicted by the Grand Jury for Baltimore City and charged with conspiracy to violate the Maryland statute proscribing escape from jail. Md. Ann. Code art. 27, § 139(a).[2] Whitfield, a then jail inmate, and Little, a

1. Ms. Davis is not a party to this appeal.
2. That section of the criminal code has been recently much attacked on the ground that it is unconstitutional. The Court of Appeals and this Court

then cadet guard, were also charged with a handgun violation, Md. Ann. Code art. 27, § 36B(b). Little was additionally charged with delivering "one .25 caliber automatic pistol" to Whitfield. All three accused pleaded not guilty to the indictments, and the case proceeded to a trial by jury on March 29, 1977. On the second day of trial, Judge David Ross declared a mistrial.

Three months later, June 22, 1977, a new jury, presided over by Judge Milton Allen, was sworn and the three defendants were retried. After a protracted trial, the jury found: 1) Whitfield guilty of the conspiracy and handgun charges, 2) Little guilty of the handgun and contraband charges but not guilty of conspiracy, and 3) Davis guilty of conspiracy.

The factual scenario began in the spring of 1976. From May to July of that year, Whitfield and one Thomas Brown were involuntary residents in the Baltimore City Jail. By happenstance, each was represented, on unrelated criminal matters, by the same attorney, Marshall Stewart. On July 2, 1976, Brown was in the Southwestern District Court for a hearing on a case there pending against him. Stewart, who was representing Brown in that proceeding, was also present. Brown took Stewart aside and told him he "had some information about a pistol" in the jail, and that he wanted "to speak to somebody" about it. Stewart informed the Police Captain in charge of the District, and Brown was taken to Central Police Headquarters where he gave a written statement relative to the details of the gun's being in the jail.

Shortly thereafter, the police alerted the Warden of the jail that a pistol had been carried into the institution, and that Whitfield and Cadet Little knew where it was. Correctional Major Howard Parks, joined by Captain Calvin Young and Lieutenant William Britton, accosted Whitfield in a passageway of the jail and ordered him to accompany them to a secluded section. There, Young and Britton confronted Whitfield with the fact that they knew "that he was in

have, however, upheld the constitutionality of the statute. *See* Clark v. State, Md. (No. 72, September Term, 1978, filed January 5, 1979); State v. Rogers, 40 Md. App. 573, 392 A. 2d 1186 (1978).

possession of a weapon within the institution." No *Miranda*[3] warnings were given prior to the confrontation or subsequent interrogation. In the words of Major Parks, the objective was "to obtain the weapon and get it out of the institution."

Whitfield admitted knowledge of the pistol and was sent, unaccompanied, to retrieve it. He returned with the gun which was wrapped in a shirt. Britton then took him to Parks's office for further questioning. Whitfield was told "he could contact his attorney," but no other rights were read to him. Whitfield then used the phone, apparently to call Stewart.

Several minutes later, a Mr. Clauss, Stewart's "legal assistant," arrived. Under renewed interrogation by Lt. Britton, with Clauss present, "Whitfield laid everything out . . . what was supposed to have transpired." Whitfield's statement implicated Little and Davis. Indictment and trial followed.

On appeal to this Court, Whitfield and Little pose three contentions. We shall discuss each in the order raised by the appellants, adding such additional facts as may be necessary for a better understanding of the resolution of the issue.

I.

> "The retrial of the present cases was barred by the Double Jeopardy Clause[4] as a result of prosecutorial overreaching."

Appellants argue that:

> "The failure of the prosecutor in the present case to disclose to Judge Ross that Whitfield and Davis were being represented by an attorney who had worked out an arrangement for leniency for the State's chief witness [Brown] and who was also a potential witness against his clients was clearly prosecutorial overreaching under either the

3. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 294 (1966).

4. The Fifth Amendment Double Jeopardy clause mandates that, "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb. . . ."

> intentional misconduct or gross negligence standards." (Footnote omitted.)

An analysis of those standards leads us to the opposite conclusion.

When the case was first called to trial on March 29, 1977, before Judge Ross and a jury, Whitfield and Davis were represented by Mr. Stewart. On the second day of the trial, Whitfield made known to Judge Ross that Stewart was "still representing Mr. Brown," who was the principal prosecution witness. Whitfield said that Stewart was "trying to get . . . [Brown] off of the hook, and I feel as though . . . I am not getting fair representation by the attorney representing me."

A bench conference before Judge Ross disclosed that Stewart had, in fact, represented Brown, Whitfield, and Davis in separate matters prior to the disclosure by Brown, at Southwestern Police Station, of the gun's presence in the jail. Stewart had told Whitfield that he, Stewart, would not be representing Brown during Whitfield's current trial. Stewart admitted, however, that he had negotiated with the State for leniency for Brown in return for Brown's cooperation in the case against Whitfield, Little and Davis. The prosecutor said that he knew about Stewart's involvement with both Brown and Whitfield "for quite sometime" but had been assured by Stewart that Stewart "had had no contact with Mr. Brown since" the revelation about the gun on July 2, 1976. After hearing from all the parties, and with the express concurrence of all three defendants, Judge Ross declared a mistrial. He based his declaration on the ground that it was of "manifest necessity, under the total circumstances," to avoid forcing Whitfield to trial in view of Whitfield's feelings toward Stewart and the apparent conflict of interest.

Prior to the commencement of the second trial, a hearing was held on the defense motions to dismiss the indictments and to suppress oral and written statements made by Whitfield and Davis. The motions averred that a retrial would subject the defendants to double jeopardy because of prosecutorial misconduct in failing to disclose Stewart's conflict of interest to the court. It was also argued that the statements taken by police from Whitfield and Davis should

have been suppressed because of ineffective assistance of counsel caused by Stewart's conflict of interest.

The trial court granted the motion to suppress the statements made by Whitfield and Davis at police headquarters. All other defense motions, including the motion to suppress the oral statements made by Whitfield to Young and Britton in the City Jail, were denied.

Recently, in *Thompson v. State,* 38 Md. App. 499, 381 A. 2d 704 (1978), we discussed prosecutorial overreaching in relation to double jeopardy. We said:

> "Although the double jeopardy clause is designed to protect the defendant against multiple punishments or repeated prosecutions for the same offense, *United States v. Dinitz,* 424 U. S. 600, 96 S. Ct. 1075, 47 L.Ed.2d 267 (1976), a request by a defendant for a mistrial ordinarily removes any bar to reprosecution even though the motion was necessitated by prosecutorial or judicial error. *Lee v. United States,* 432 U. S. 23, 97 S. Ct. 2141, 53 L.Ed.2d 80 (1977); *United States v. Dinitz, supra.* This rule is not absolute and where a mistrial is the product of prosecutorial or judicial overreaching, the double jeopardy clause prevents a retrial. *Lee v. United States, supra; United States v. Jorn,* 400 U. S. 470, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971). The exact boundaries of prosecutorial overreaching, necessary to bar retrial, have not been specifically delineated by the Supreme Court. Other courts which have considered the point generally hold that prosecutorial error attributable to negligence does not amount to overreaching, *People v. Baca,* Colo., 562 P. 2d 411 (1977), while intentional misconduct calculated to gain a more favorable chance for conviction or to abort a trial that is going badly prevents reprosecution. *United States v. Kessler,* 530 F. 2d 1246 (5th Cir. 1976). The appellant argues that prosecutorial overreaching is not confined to intentional misconduct but encompasses gross negligence as well. *Commonwealth v. Bolden,* 472

> Pa. 602, 373 A. 2d 90 (1977). Although in *Bolden,* the Court noted that it is unclear from the decisions of the Supreme Court whether overreaching is limited to intentional misconduct or whether it extends to gross negligence on the part of the prosecutor or judge, it concluded gross negligence was encompassed in the term after an examination of the purposes underlying the double jeopardy clause. The Court stated:
>
> > 'A defendant forced to request a mistrial by conduct which conspicuously fails to satisfy professional standards should not be required to bear the heavy burdens incident to reprosecution.' 373 A. 2d at 109." 38 Md. App. at 502, 381 A. 2d at 705-06.

While the precise perimeters of the term, "prosecutorial overreaching" have not, as *Thompson* points out, been drawn by the Supreme Court or the Maryland Court of Appeals, Judge Moylan shed some light on the subject in *Loveless v. State,* 39 Md. App. 563, 387 A. 2d 311 (1978),[5] when he stated:

> "Except in those rare instances where the prosecution or the court has deliberately sabotaged a trial that was going badly, the available redress where an irremedial error is recognized in mid-trial is the declaration of a mistrial followed by a retrial. . . .
>
> . . .
>
> The only time that a retrial is barred under double jeopardy principles is when there has been such prosecutorial or judicial overreaching as to have mounted to a deliberate and intentional sabotaging of the earlier trial." (Citations omitted.) 39 Md. App. at 565-66, 387 A. 2d at 313.

Thompson and *Loveless* allude to the possibility that the gross negligence standard may be encompassed within the term "prosecutorial overreaching," *Thompson v. State,* 38

5. Certiorari denied October 20, 1978.

Md. App. at 504, 381 A. 2d at 706, *Loveless v. State,* 39 Md. App. at 569, 387 A. 2d at 315, but we did not so hold. It was unnecessary for us to decide that question because the facts were insufficient to create an issue of gross negligence.

The bar against double jeopardy does not prevent a retrial where the prosecution's commission or omission, absent an intent to cause a mistrial, amounts, at most, to the exercise of poor judgment. *Loveless v. State, supra; Thompson v. State, supra; Commonwealth v. Bolden,* 472 Pa. 602, 373 A. 2d 90 (1977). While the facts before us indicate poor judgment on the part of the prosecution, we discern no intentional misconduct or gross negligence.

Appellants place heavy reliance upon the Code of Professional Responsibility as the standard by which to measure the Assistant State's Attorney's conduct in the matter *sub judice.* They refer us to DR 1-103,[6] DR 5-102,[7] and DR 5-105.[8] Violations of the disciplinary rules, however, are not necessarily tantamount to gross negligence or intentional misconduct.

From the facts in this case, we cannot infer intentional misconduct on the part of the prosecution. He admitted to the court that he had been aware of the representation by Mr. Stewart of Brown, Whitfield and Davis, but said he had discussed the possible conflict with both defense attorneys, Stewart and the counsel for Little, prior to the aborted first trial. The prosecutor stated that based on those discussions, he did not feel there would be a dispute of fact requiring Mr. Stewart's testimony. Therefore, the Assistant State's Attorney saw no need to inform the court of Stewart's representation of possible conflicting interests. There was no indication by Whitfield prior to, or during, the first day of the short-circuited first trial that he was dissatisfied with Stewart's services.

6. DR 1-103 requires a lawyer to report violations of disciplinary rules to the appropriate tribunal.

7. DR 5-102 prohibits the representation of a client where the lawyer is a potential witness in the same case.

8. DR 5-105 prohibits representation of multiple clients with conflicting interests.

Whitfield became alarmed after he had observed Stewart associating with Brown and Brown's family during recesses in the trial proceedings. Whitfield knew from the outset of the case of Stewart's relationship with Brown, but he had apparently decided to proceed with the *status quo.* Moreover, it is clear from the record that after the initial incident concerning a gun being in the jail on July 2, 1976, Stewart did not act as counsel for Brown. Stewart did, however, become Whitfield's and Davis's attorney for the escape and related offenses case, with no further dealings with Brown on the matter.

The Assistant State's Attorney vigorously argued against a mistrial. That fact, while not conclusive, at least suggests that there was no intent to "sabotage" the trial in the hope of gaining a more favorable chance of conviction or abort it because it was going badly.[9]

Under the particular facts of this case, we perceive no prosecutorial overreaching in the form of gross negligence or intentional misconduct which would serve to activate the double jeopardy clause bar to the retrial of appellants.

II.

"Evidence of other crimes was improperly admitted into evidence.

A. The State's evidence was insufficient to permit this Court to determine that evidence of other crimes was admissible under the common scheme exception.

B. The State failed to present clear and convincing evidence that the other crimes were committed and that Whitfield and Little had committed them.

C. Evidence of other crimes should have been excluded on the ground that its probative value was far outweighed by its prejudicial effect."

9. The State's opposition to the mistrial in the case now before us, arising in point of time as it did, negates the idea of the trial "going badly."

During its case in chief, the prosecution sought to introduce a written statement given by Brown to the police on July 3, 1976. The statement set out in detail the manner in which the defendants passed the gun into the jail via Davis, to Little, to Whitfield. According to the text of the writing, Cadet Little brought "in packages of narcotics" for Brown, Whitfield and other inmates on occasions previous to the date the gun was smuggled by Little past the other guards and into the institution.

Little's attorney objected to that part of the statement dealing with the narcotics. The prosecutor proffered that the statement was admissible under the "common scheme" exception to the rule that evidence of other unrelated crimes is inadmissible at trial of a particular crime. Judge Allen overruled the objection, saying, "I think it is a common scheme and design . . . to bring contraband into the jail. I will admit it." Thereafter, the statement was read to the jury *in toto,* and testimony was furnished by Brown concerning both the charged and uncharged "other crimes." Oddly, only Whitfield objected to the oral testimony regarding the uncharged crimes, and he was overruled on the "common scheme theory." Only Whitfield's argument as to the oral testimony was thus preserved for appeal, *Hyson v. State,* 225 Md. 140, 169 A. 2d 449 (1961). Little has no standing to raise the issue. Nevertheless, pursuant to Md. Rule 1085, we shall consider the issue with respect to both appellants because the oral testimony did not appreciably add to the written statement.

The Court of Appeals, in *Ross v. State,* 276 Md. 664, 350 A. 2d 680 (1976), supplied a definitive analysis of the evidentiary rule pertaining to the use of prior offenses or prior convictions against an accused who is on trial for different or unrelated acts. The Court said:

> "The frequently enunciated general rule in this state, followed uniformly elsewhere, is that in a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of

that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible. This principle is merely an application of the policy rule prohibiting the initial introduction by the prosecution of evidence of bad character. Thus, the state may not present evidence of other criminal acts of the accused unless the evidence is 'substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character.' C. McCormick, *Evidence,* § 190 (2d ed. 1972).

. . . [A]part from the fundamental proposition that an accused may be convicted only by evidence which shows that he is guilty of the offense charged, and not by evidence which indicates his guilt of entirely unrelated crimes, there are additional reasons underlying the general rule. Evidence of other crimes may tend to confuse the jurors or prejudice their minds against the accused and to predispose them to a belief in his guilt. Finally, unless he knows in advance that evidence of other crimes is to be used against him, the accused will be unprepared to defend against such evidence.

There are exceptions to this general exclusionary rule which, perhaps, are equally well-recognized. *Thus, evidence of other crimes may be admitted when it tends to establish (1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of a crime on trial.* Additional exceptions have also been recognized: When the several offenses are so connected in point of time or circumstances that one cannot be fully shown without proving the other, and to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial, and to prove other like crimes by the accused so

nearly identical in method as to earmark them as the handiwork of the accused." 276 Md. at 669-70, 350 A. 2d at 684. (Emphasis supplied.) (Citations omitted.)

Accord, Cross v. State, 282 Md. 468, 386 A. 2d 757 (1978); *McKnight v. State,* 280 Md. 604, 375 A. 2d 551 (1977); *Martin v. State,* 40 Md. App. 248, 389 A. 2d 1374 (1978). *See also Worthen v. State,* 41 Md. App. (No. 499, September Term, 1978, filed March 22, 1979).

There are, as the Court stated in *Cross v. State, supra,* at 473, 386 A. 2d at 761, exceptions which "appear to swallow the rule." Judge Digges, writing for the Court, said:

"As a general rule, in order to gain the admission of evidence of other criminal acts under the common scheme or plan exception it is necessary that the crimes, including the crime charged, so relate to each other that proof of one tends to establish the other. Moreover, there must be 'not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*' 2 J. Wigmore, *Evidence* § 304, at 202 (3d ed. 1940) (emphasis in original). The concurrence of common features under this exception, however, must be more than simply a manner of operation, which is possessed to some extent by most criminal recidivists. A method of operation is not, by itself, a common scheme, but merely a repetitive pattern. Thus, evidence of other crimes can be introduced under the common scheme exception only when the relationship between the time, place, circumstances or parties involved in the crimes is such that the uncharged crime or crimes 'support the inference that there exists a single inseparable plan encompassing both the charged and uncharged crimes, typically, but not exclusively, embracing uncharged crimes committed in order to effect the primary crime for which the accused has

> been indicted.' 312 N.E.2d at 177, 356 N.Y.S.2d at 42-43." 282 Md. at 475-76, 386 A. 2d at 762.

The prosecutor, in answer to the objections by the defense, made the following proffer:

> "I submit in this case this evidence of other crimes is admissible and tends to show a common scheme, a plan which deals with a bringing into the Baltimore City Jail contraband, a weapon, in the Baltimore City Jail by a guard. I said to the jury in my opening statement, how does an inmate just go up to a guard, he doesn't just go up to a guard and say, hey, get in a gun for me. There has to be some handling of it, something that he has over the guard or some prior connection with the guard in other criminal activities which makes the guard susceptible to a part of a general scheme and the plan to make the guard be able to not submit, but make the guard subject to bringing in that contraband. I submit to the Court that the evidence will be that this guard was continuing to bring to inmates contraband other than weapons, explaining the intent of the activities of bring [*sic*] in pieces of contraband, a weapon, part of the same common scheme and design as bringing previous narcotics in and that's why he was able to be approached. It's an essential part of the State's case, if I can show to the jury why it is that they picked this particular guard over all the others."

To underpin their argument that the State's proffer of evidence was insufficient to allow the court to admit it under the common scheme exception, appellants rely on *Cross v. State, supra; McKnight v. State, supra;* and *Jones v. State,* 38 Md. App. 432, 381 A. 2d 317 (1978), *aff'd, State v. Jones,* Md. , (No. 7, September Term, 1978, filed January 4, 1979). We think those cases to be inapposite.

The State's evidence, offered in *Cross* under the common scheme exception, consisted merely of a blue car having been seen in front of two residences where break-ins had occurred on a particular day. The defendant was charged with one of

the break-ins, and evidence concerning the other break-in was admitted against him. The Court of Appeals, in reversing this Court, *Cross v. State,* 36 Md. App. 502, 374 A. 2d 620 (1977), held the evidence "clearly inadequate to show any kind of systematic scheme or plan sufficient to allow admission of the evidence of the other crime." 282 Md. at 476, 386 A. 2d at 762.

McKnight was jointly tried on four charges of robbery allegedly committed within the time span of one month. The Court, in rejecting the State's argument that joinder of the four cases was justified under the "signature or handiwork" exception, declared that "such similarities as existed here 'fit into an obvious tactical pattern which would suggest itself to almost anyone disposed to commit a depredation of this sort.'" 280 Md. at 614, 375 A. 2d at 557.

Similarly, this Court, in *Jones,* reversed the conviction of a defendant who had been tried jointly upon indictments charging the commission of three armed robberies on the same day. We rejected the State's reliance upon the common scheme exception and observed, "All that we . . . [had before us was] a series of similar but unrelated robberies which do not have the common features necessary to establish a common scheme." 38 Md. App. at 439, 381 A. 2d at 322.

Our review of the record in the instant case leads us to conclude that the evidence proffered and admitted by the State was sufficient to meet the requirements of the common scheme or plan exception to the general rule. *Ross v. State, supra; Cross v. State, supra; Martin v. State, supra.* "[T]he crimes, including the crime charged, so relate to each other that proof of one tends to establish the other." *Cross v. State, supra,* 282 Md. at 475, 386 A. 2d at 762. It is apparent that Judge Allen was able to observe sufficient "relationship between the time, place, circumstances or parties involved in the crimes" so as to permit the introduction of the evidence as being part of a common scheme. *Id.* Paraphrasing the Court in *State v. Jones, supra,* the evidence adduced by the State in the case at Bar showed a "causal relation or logical or natural connection," between the furtive transporting of narcotics to inmates in the City Jail and the smuggling of the

weapon into the same institution, so as to allow a rational inference that the dealings were a "continuing transaction."

Appellants also maintain that the State failed to demonstrate by clear and convincing evidence that the "other crimes" were committed, and that Whitfield and Little committed them.

The rule is that the accused's involvement in an uncharged crime must be established by clear and convincing proof. *Cross v. State, supra,* 282 Md. at 478, 386 A. 2d at 764; *Brafman v. State,* 38 Md. App. 465, 474, 381 A. 2d 687, 691-92 (1978). The Court, in *Cross,* n. 7, opined:

> "The preferred method for submitting any evidence of other crimes to the court during trial would be by way of a proffer to the trial judge outside the presence or hearing of the jury. *Such a proffer not only protects the jury from immediate prejudice, but also allows the trial judge to determine whether there is any way to limit the prejudicial aspects of the evidence while retaining its probative character and whether the evidence should properly be introduced at that time. See United States v. Bailey,* 505 F. 2d 417, 420 (D.C. Cir. 1974), *cert. denied,* 420 U. S. 961 (1975)." 282 Md. at 478, 386 A. 2d at 764. (Emphasis supplied.)

We think the trial judge in the instant case was presented with a sufficient proffer by the State to establish a factual question regarding the common scheme involvement among Little, Whitfield and Brown. The written statement and the oral testimony tended to establish that Whitfield, Brown and Davis used Little as a conduit for the carrying of narcotics into the jail without subjecting the contraband to search and seizure by the other custodial personnel. The same method that was employed in the smuggling of the narcotics was used to secrete the weapon.

Brown testified that he was present on numerous occasions when plans were discussed between Little and Whitfield relative to carrying narcotics into the jail. That evidence established the appellants' involvement in the other crimes,

Cross v. State, supra, and satisfied the burden of proof shouldered by the State. *Id.*

Appellants next attack the common scheme evidence by asserting that its probative value was outweighed by its prejudicial effect.

Judge Digges, in *Cross, supra,* said:

> "In many instances, the breadth of these exceptions will present the prosecution with little difficulty in 'pigeonholing' the evidence within one of them. But it should be remembered that, though the evidence may fall within one or more of the exceptions, the trial judge still possesses discretion as to whether it should be received. In the judicious determination of this issue he should carefully weigh the necessity for and probativeness of the evidence, concerning the collateral criminal act against the untoward prejudice which is likely to be the consequence of its admission. *Harris v. United States,* 366 A. 2d 461, 463-64 (D.C. 1976); *see McKnight v. State, supra* at 612-13 [556]. *See generally McCormick on Evidence, supra,* § 190, at 453-54. In some cases, this may require that evidence of the criminal actions of the defendant be totally excluded; in others, admission of portions or all of the evidence of the defendant's specific criminal actions may be permissible." 282 Md. at 474, 386 A. 2d at 761.

See also Brafman v. State, supra, 38 Md. App. at 474-75, 381 A. 2d at 692-93.

The problem in cases such as that now before us is one of balancing the probative value of the evidence against its prejudicial effect. The balancing process is described by McCormick in his *Handbook of the Law of Evidence* § 190 at 453 (2d Ed. 1972), where it is said:

> "[S]ome of the wiser opinions . . . recognize that the problem is . . . one of balancing, on the one side, the actual need for the other-crimes evidence in light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that

> the other crimes were committed and that the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility." (Footnotes omitted.)

See Brafman v. State, 38 Md. App. 465, 475-76, 381 A. 2d at 693 (1978).

Appellants argue that "introduction of the other crimes evidence served no legitimate need" and that "it was unnecessary for the State to prove Little's motive in order to prove its case on the crime charged." [10] *See Martin v. State, supra,* 40 Md. App. at 255, 389 A. 2d at 1377 (1978). We view the matter in a different light. As we see it, aside from Brown, there was no other known witness who could have testified as to the conversations and the machinations that took place among Little, Whitfield and Davis. Brown's testimony was absolutely crucial to the State's case on the issue of whether a conspiracy was extant to get a gun into the jail and use it to effect an escape. The prior dealings leading up to the time the weapon was smuggled into the jail were, in our view, material to the showing of the existence of a conspiracy. Brown's evidence was probative on the issue of Little's involvement as the perdu of the other two co-conspirators.[11] Although evidence of prior criminal acts by a defendant, not charged in the matter for which he is on trial, is prejudicial to a defendant, we believe that the evidence educed by the State in the case *sub judice* was properly balanced by Judge Allen, and that he correctly found that its probative value outweighed its prejudicial effect. We perceive no error.

III.

Appellants seek to invoke *Miranda* [12] and thereby exclude

10. It was necessary for the State to show that Little changed sides. Instead of guarding the inmates, the job he was hired to do, he became an ally of Whitfield, Davis and Brown.

11. Little proved to be the kind of guard against whom other guards guard.

12. *See* n. 3, *supra.*

from the evidence Whitfield's inculpatory oral statement which was made to the correctional officers, Captain Young and Lieutenant Britton. Appellants asseverate that "[b]ecause Miranda warnings were not given, the trial court improperly admitted incriminating statements made by Whitfield during interrogations conducted by jail authorities." Appellants had raised this issue by way of a pretrial motion to suppress, but Judge Allen denied that motion. At trial, they failed to object to the testimony establishing that the incriminating statements were made by Whitfield.

The State asserts that the issue has not been preserved for our review because the record shows no objection was voiced by Whitfield when testimony concerning his retrieving the gun and his statement that "he wasn't going to see Mr. Dardeen [another jail employee] get hurt" was introduced. Inasmuch as those two answers went to the very viscera of Whitfield's oral admission, the State reasons that the admissibility *vel non* of the oral statement, as such, is not preserved. In short, the State says that the failure to object to the questions which drew the damaging response constitutes a waiver of the earlier motion to suppress. Of course, Little has no standing to raise the *Miranda* issue. The privilege against self-incrimination is highly personal and may not be vicariously utilized. *Butz v. State,* 221 Md. 68, 156 A. 2d 423 (1959). Little may not seek refuge under Whitfield's constitutional umbrella.

The difficulty with the State's position relative to Whitfield is that it seems to overlook Md. Rule 736, which provides that a motion asserting that an "omission, statement or confession" was unlawfully obtained must be raised before the trial. Md. Rules 736 a 4 and 736 b. If the hearing court denies the motion to suppress, that ruling "is reviewable on a motion for a new trial or on appeal of a conviction." Md. Rule 736 g 2. The rule became effective July 1, 1977, the day after the testimony that the State thinks constitutes a waiver. The order of the Court of Appeals adopting the new rules of criminal procedure states:

> "ORDERED, that the Rules and Forms hereby

> adopted by this Court shall govern the courts of this State and all parties and their counsel in all actions and proceedings; and shall take effect and apply to all proceedings commenced on and after July 1, 1977, and insofar as practicable, to all proceedings then pending. . . ."

There is, we believe, no practical reason for not applying Rule 736 to the instant case. Therefore, we hold that the issue of the applicability *vel non* of *Miranda* has been properly preserved. Md. Rule 736 g 2.

Miranda proscribes custodial interrogations unless specified warnings are first furnished to an accused and then knowingly and intelligently waived by him. It is undisputed that the questioning of Whitfield in the City Jail by Captain Young and Lieutenant Britton was not preceded by *Miranda* admonitions, nor, apparently, was *Miranda* even mentioned.

The record is clear that when the two guards stopped Whitfield, led him to a secured area, and demanded that he surrender the gun, he at first denied knowledge of it, but shortly thereafter went to the place where he had hidden the pistol and then carried it to Young and Britton. Whitfield was then taken to Major Parks's office for further questioning. Once there, Britton informed Whitfield that Whitfield could contact an attorney. No other warnings were given. Whitfield requested counsel, and the interrogation was halted. By coincidence, Mr. Clauss [13] was in the City Jail visiting another prisoner. Clauss consulted with Whitfield. Thereafter Whitfield "laid everything out." Whitfield contends "that inasmuch as his statements flowed from questioning initiated by Young and Britton after they accosted him and took him to a secluded part of the jail, the custodial interrogation requirement of *Miranda* is met and the oral statement made by him were [*sic*] inadmissible at his trial."

Unequivocally, knowledge by prison or jail officials of a gun's being in the hands of an inmate creates an emergency with which they must cope immediately. The situation

13. The record is unclear as to Clauss' status except that he worked for Marshall Stewart. He was described as an investigator and as an associate.

demands prompt and drastic action. The gun's presence in the penal institution is a "bell ringer" that an escape attempt is imminent, with the strong possibility that one or more homicides may occur. It behooves the officials to move with alacrity to locate the weapon and confiscate it in order to protect their own lives, the lives of the prison populace, visitors who might be in the institution at the time, and the public generally.

Without question, an inmate's possession of a gun is a breach of prison discipline. In that connection, this Court, speaking through then Chief Judge Murphy, stated in *Hunt v. State,* 2 Md. App. 443, 447, 234 A. 2d 785, 787-88 (1967):

> "Inmates must of necessity surrender some of their constitutional rights so that proper prison administration and discipline may prevail. In *Stewart v. State,* 1 Md. App. 309, 316, [229 A. 2d 727, 731 (1967)], and *Smith v. State,* 1 Md. App. 297, 301, [229 A. 2d 723, 725 (1967)], we held that searches of inmates by prison authorities were reasonably necessary in the fulfillment of the custodian's administrative duties. Similarly, interrogation by prison officials with relation to the maintenance of internal security and discipline and to the rules and regulations of the prison, where the thrust and purpose of the interrogation does not relate to a prosecution for any crime, does not fall within the ambit of the *Miranda* decision." (Footnote omitted.)

Appellants rely on *Mathis v. U. S.,* 391 U. S. 1, 88 S. Ct. 1503, 20 L.Ed.2d 381 (1968), and its siblings. *See, e.g., U. S. v. Redfield,* 402 F. 2d 454 (4th Cir. 1968); *State v. Harris,* 576 P. 2d 257 (Mont. 1978); *State v. Davis,* 67 N. J. 222, 337 A. 2d 33 (1974). In *Mathis,* the defendant was interrogated by a tax investigator while Mathis was serving a prison sentence for an unrelated offense. Statements made by Mathis, without benefit of *Miranda* warnings, were subsequently admitted against him in a criminal prosecution for filing false tax refund claims. The Supreme Court held that even though the interrogation was not conducted in furtherance of criminal proceedings, such investigations frequently lead to criminal

charges and that possibility, itself, was sufficient to warrant that *Miranda* warnings be given. *Cf., State v. Davis, supra,* (interrogation by a parole officer). The United States Court of Appeals for the Fourth Circuit reversed a conviction of a prison inmate on marijuana charges because statements used by the prosecution at trial against the defendant were elicited from the defendant by a warden at a disciplinary hearing without the *Miranda* warnings having been given. The Court held that *Mathis* precluded the use of statements obtained by prison officials without *Miranda* warnings even where the intent is nonprosecutorial at the time of questioning. *United States v. Redfield, supra.*

The *Mathis* reasoning has been followed in other cases. *Baxter v. Palmigiano,* 425 U. S. 308, 96 S. Ct. 1551, 47 L.Ed.2d 810 (1976); *Sands v. Wainwright,* 357 F. Supp. 1062, 1093, n. 76 (M.D. Fla. 1973), *vacated on other grounds,* 491 F. 2d 417 (5th Cir. 1973); *State v. Harris, supra. See generally Biddy v. State,* 127 Ga. App. 212, 193 S.E.2d 31 (1972); Annot., 31 A.L.R.3d 565, 666 (1970). The State, however, argues that such cases are "all factually inapposite in that they involve either post-emergency disciplinary hearings or investigations which do not deal with possible imminent breaches of prison security."

Hunt v. State, supra, upon which the State relies, is the sole Maryland case to ever address the issue, although a number of other jurisdictions have had the occasion to speak on the subject. *People v. Sanchez,* 65 Cal. 2d 814, 423 P. 2d 800 (1967) (statements admissible due to apprehension of safety for prison by guard); *State v. Archible,* 25 N. C. App. 95, 212 S.E.2d 44 (1975) (interrogation of prison guard held non-custodial); *State v. Abbott,* 21 Utah 2d 307, 445 P. 2d 142 (1968) (interrogation immediately after stabbing to find owner of knife); *State v. Persinger,* 72 Wash. 2d 561, 433 P. 2d 867 (1967), *cert. denied,* 393 U. S. 864 (1968) (statement taken during course of escape); *State v. LaRue,* 19 Wash. App. 841, 578 P. 2d 66 (1978) (on-the-scene investigation for weapon).

We agree with the State that the above-cited cases more aptly apply to the circumstances surrounding the incriminating statements made by Whitfield, than do those

which journey to an opposite end. The questioning of Whitfield was not an interrogation, looking toward prosecution, but an on-the-scene investigation for a deadly weapon which presented a threat to the security of the jail. *State v. LaRue, supra.* Moreover, a fair reading of the record discloses that the correctional officers were preoccupied more so with the recovery of the gun, whether there were other guns inside the jail, and the details of the escape attempt, than with the apprehension and punishment of Whitfield.

Appellants aver that *Mathis,* decided after *Hunt,* "severely eroded" *Hunt's* dicta as "precedental value." We disagree. *Mathis* and its progeny were concerned with totally different circumstances, a factual dissimilarity which distinguishes the *Mathis-Redfield* rationale from the case *sub judice.* The value of the dicta in *Hunt* as a guiding light for cases of this genre has not been extinguished, nor has its illumination been dimmed.

We hold that where, as here, correctional officers of a penal institution are informed of the existence of a weapon cached within the institution's confines and, consequently, presenting the possibility of an imminent breach of security or a volatile situation, a questioning of a person reasonably likely to have knowledge of the weapon's whereabouts so as to aid the officials in removing the weapon from the institution, or which questioning is designed to secure the safety of the prison population, is permissible. Incriminating statements made by any party involved in the immediate scope of the investigation may, within the sound discretion of the trial judge, be admitted in evidence even though the declarant was not afforded proper *Miranda* warnings before questioning.

We are not to be understood as sanctioning a *carte blanc, sans Miranda* interrogation by correctional officials of prison inmates. Prisoners do not surrender all of their constitutional rights when they enter a penal institution. *Miranda* is normally applicable to them as well as to the general populace. Only the most unusual explosive circumstances will excuse *Miranda* compliance.

Judge Allen thoughtfully summed up the situation that

confronted Major Parks, Captain Young and Lieutenant Britton when he said:

> "[A] prison is a different type of facility than anything [else] we have in this country. . . . [There] different rules are followed, different regulations for control, different anxieties arise and reactions to those are different. . . . [W]hereas it might have been wise in the courthouse, for instance, to rush in with a squad of policemen to find . . . [the] gun that had gotten into the courthouse, I find the actions of the officers at the Baltimore City Jail wise and commendable in the course that they took, . . . as quietly as possible, without exciting the other prisoners, or without letting it be known what was going on, to secure the dangerous situation [in which] they found themselves. . . . . [T]hey went about it by quietly talking to Mr. Whitfield, letting him know they knew he had a gun or that he had access to a gun, directed him to go get it rather than charge through the halls with him to get it, recovering the gun and then questioning Mr. Whitfield with reference to — of the details of the alleged prison break or the planned prison break. . . . I think it would be stretching it a great deal if we required prison officials acting in a very dire emergency to accord to prisoners under their care the right guaranteed by the Miranda case."

We agree.

Judgments affirmed; costs to be paid by appellants.